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8 VARIAN MEDICAL SYSTEMS, INC.

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION  
12

13 UNIVERSITY OF PITTSBURGH OF THE  
COMMONWEALTH SYSTEM OF HIGHER  
14 EDUCATION d/b/a UNIVERSITY OF  
PITTSBURGH, a Pennsylvania non-profit  
15 corporation (educational),

16 Plaintiff,

17 v.

18 VARIAN MEDICAL SYSTEMS, INC., a  
19 Delaware corporation,

20 Defendant.  
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Case No. CV 08-02973 MMC

**VARIAN'S REPLY TO UNIVERSITY  
OF PITTSBURGH'S OBJECTIONS  
TO VARIAN'S REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
MOTION TO DISMISS PLAINTIFF'S  
CLAIMS PURSUANT TO FED. R.  
CIV. P. 12(B)(6) BASED ON  
DOCTRINE OF RES JUDICATA**

Date: September 5, 2008  
Time: 9:00 a.m.  
Courtroom: 7, 19th Floor

1 Varian Medical Systems, Inc. (“Varian”) has properly asked the Court to take notice of  
2 certain items that are on file in another action between the parties. Varian’s requests are narrow  
3 and grounded in law and the objections thereto asserted by the University of Pittsburgh (“UPitt”)  
4 should be overruled.

5 **A. Varian’s Request for Judicial Notice Is Proper**

6 Contrary to the picture painted by UPitt, Varian has asked the Court to take judicial notice  
7 of the fact that (1) certain documents were filed in a related proceeding in the United States  
8 District Court for the Western District of Pennsylvania, and (2) certain statements or findings  
9 were made within those documents. Such narrow use of these documents is wholly appropriate.  
10 *See* Request for Judicial Notice in Support of Varian’s Motion to Dismiss Pursuant to Fed. R.  
11 Civ. P. 12(b)(6) (“Varian’s RJN”) (citing relevant authorities). Not only does UPitt concede this  
12 principle in its objections, but it relies on the same principle in support of its own Request for  
13 Judicial Notice and its Opposition to Varian’s Motion to Dismiss.

14 UPitt’s objections to Varian’s RJN are based on purely hypothetical concerns. UPitt  
15 complains at length that Varian has supposedly made overly broad requests to take judicial notice  
16 of the truth of various statements made in certain documents. UPitt fails, however, to identify,  
17 within Varian’s Memorandum of Points and Authorities in support of its motion to dismiss, any  
18 improper citations or uses of the exhibits cited in Varian’s RJN. Thus, it is unclear what UPitt  
19 actually objects to.

20 UPitt’s objections are replete with faulty generalizations about Varian’s alleged improper  
21 requests to the Court to take notice of “judicial admissions.” UPitt mischaracterizes Varian’s  
22 RJN. In no instance has Varian asked the Court to take notice of “judicial admissions.” Instead,  
23 Varian asks the Court to take judicial notice of certain factual representations made by Plaintiff to  
24 the Pennsylvania court as contained in the public record. Taking notice of such representations is  
25 permissible. *See, e.g., Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995) (holding that  
26 admissions of fact in a plea agreement are judicially noticeable); *In re A-Z Elecs., LLC*, 350 B.R.  
27 886, 888 (Bankr. D. Idaho 2006) (“The Court takes judicial notice of its files and records in those  
28 cases, Fed. R. Evid. 201, and treats the submissions of the debtors in their respective cases as

admissions under Fed. R. Evid. 801”); *Munno v. Town of Orangetown*, 391 F. Supp. 2d 263, 268 (S.D.N.Y. 2005) (“the court may take judicial notice of public records and of ‘admissions in pleadings and other documents in the public record filed by a party in other judicial proceedings that contradict the party’s factual assertions in a subsequent action.’”). Factual representations made to a court are distinct from admissions in a complaint, answer, or response to a Request For Admission, the purpose of which is merely to define and narrow the issues in the case rather than to assert that a statement is known to be true and should be relied upon by the Court.

Thus, for example, UPitt represented to the Pennsylvania court that Carnegie Mellon University was willing to be added as a party in that action. *See* Varian’s RJN, Ex. I at 1, 4-5. This Court may take judicial notice of that fact because UPitt may not “backpedal” from such a representation that it made to another court. *See Scholes*, 56 F.3d at 762. At a minimum, this Court may take judicial notice of the fact that the representation was made and conclude that the representation was binding on UPitt in the Pennsylvania action.

**B. Varian Does Not Ask the Court to Take Judicial Notice of the Truth of Any Fact Stated in Exhibit G**

In drafting Varian’s RJN, Varian inadvertently cited to Exhibit G—the Report and Recommendation of the Special Master filed on March 10, 2008 in the Pennsylvania Case—within the section related to taking notice of factual admissions. In fact, Exhibit G should have been cited in Section B of Varian’s RJN, which asked the Court to take judicial notice of rulings from a prior action. UPitt concedes the propriety of using Exhibit G in such a manner.

**C. UPitt’s Objections to Exhibits A and V to Varian’s Request for Judicial Notice in Support of Its Motion to Transfer Are Untimely**

Although UPitt’s objections are designated “Objections to ... Request for Judicial Notice in Support of ... Motion to Dismiss,” UPitt asserts objections to two exhibits that were submitted by Varian solely in connection with its separate Motion to Transfer. UPitt’s objections to those exhibits—Exhibits A and V to Request for Judicial Notice in Support of Varian’s Motion to Transfer—are untimely. UPitt did not challenge the use of these exhibits when it filed its other papers in opposition to the Motion to Transfer on July 11, 2008, waiting instead until August 15,

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1 2008 to assert those objections. Moreover, Exhibit A and V are the proper subject of judicial  
2 notice pursuant to the authorities cited above and in Varian's Requests for Judicial Notice.

3 **CONCLUSION**

4 For the foregoing reasons, Varian respectfully requests that the Court overrule UPitt's  
5 objections and take judicial notice of each of the documents attached to Varian's RJN to the  
6 extent and for the purposes set forth therein.

7 Dated: August 22, 2008.

8 WILLIAM L. ANTHONY  
9 MATTHEW H. POPPE  
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12 By: /s/ Matthew H. Poppe  
13 Matthew H. Poppe  
14 Attorneys for Defendant  
15 VARIAN MEDICAL SYSTEMS, INC.  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the VARIAN'S REPLY TO UNIVERSITY OF PITTSBURGH'S OBJECTIONS TO VARIAN'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S CLAIMS PURSUANT TO FED. R. CIV. P. 12(B)(6) BASED ON DOCTRINE OF RES JUDICATA was served upon the University of Pittsburgh, through its counsel, via:

_____	Hand-Delivery
_____	Facsimile
_____	First Class, US Mail, Postage Prepaid
_____	Certified Mail-Return Receipt Requested
<u>      X      </u>	ECF Electronic Service
_____	Overnight Delivery

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Dated: August 22, 2008

/s/ Matthew H. Poppe  
Matthew H. Poppe